

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
United States Department of Justice, Federal Bureau of	)	
Investigation and Drug Enforcement Agency	)	RM-10865
	)	
Joint Petition for Expedited Rulemaking	)	
	)	

**Comments of Warinner, Gesinger & Associates, LLC**

**I. INTRODUCTION**

Warinner, Gesinger & Associates, LLC (“WGA”) submits these comments in response to the Federal Communications Commission (FCC or Commission) public notice seeking comments on the Joint Petition for Expedited rulemaking, filed by the Federal Bureau of Investigation, the U.S. Department of Justice, and the U.S. Drug Enforcement Agency, which asks the Commission to resolve various issues associated with the implementation of Communications Assistance for Law Enforcement Act (CALEA).

WGA is a certified public accounting firm specializing in the provision of accounting and consulting services to local exchange telecommunications carriers throughout the United States in which the majority of our clientele are mainly rural Local Exchange Carriers (LECs).

**II. Introduction**

The original CALEA act required that Telephone company's networks must provide law enforcement agencies the ability to conduct electronic surveillance by a certain date. The CALEA Act required telephone companies to pay for the upgrades necessary, even if no requests

were ever received. A VoIP provider, which the Petition defines as a broadband telephone provider<sup>1</sup>, meets the definition of "telecommunications carrier"<sup>2</sup> as defined in CALEA, and therefore should be subject to the same standards and regulations as telephone companies.

## **II. Regulatory Classification under CALEA**

The history of CALEA and its predecessor bills (the Omnibus Crime Control and Safe Streets Act, OCCSSA, and the Electronic Communications Privacy Act, ECPA) show it has been the intent of Congress to provide for lawful electronic on changing technologies. By passing the ECPA, which amended the OCCSSA, Congress augmented the OCCSSA's coverage to include electronic communications, such as e-mail and cellular telephones.<sup>3</sup> Then again in 1994, Congress passed a second amendment to the OCCSSA, CALEA. The intent of CALEA was to insure that law enforcement agencies could conduct lawful surveillance in the face of changing technologies. CALEA was meant to be technologically neutral, insuring that a "carrier's choice of technology when offering common carrier services does not changes its obligations under CALEA."<sup>4</sup>

The Joint Petition demonstrates that "telecommunications carrier", as defined by CALEA, encompasses a much broader definition than "telecommunications carrier" as stated in the Communications Act. These two definitions are not substitutable, and instead are meant to be interchangeable. A "telecommunications carrier" under CALEA refers to all entities which provide or engage in the "transmission or switching of wire or electronic communications as a

---

<sup>1</sup> As defined in the Joint Petition for Expedited Rulemaking, RM-10865, page 16

<sup>2</sup> Joint Petition for Expedited Rulemaking, RM-10865, page 11

<sup>3</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986) - Joint Petition page 2

<sup>4</sup> CALEA Second Report and Order 7120 n. 69

common carrier for hire."<sup>5</sup> In addition, CALEA provides an alternative definition of "telecommunications carrier" of an entity which is providing "wire or electronic communications switching or transmission service" to the extent that the Commission finds to be a "replacement for a substantial portion of the local telephone exchange service and that it is in the public interest" consider such entity a telecommunications carrier.<sup>6</sup>

Regardless of the classification the Commission determines for broadband telephone providers (in the IP-Enabled rulemaking) the Commission can and should find that such services meet the definition of "telecommunications carriers" under CALEA.

### **III. Disparate treatments can create regulatory arbitrage**

If the FCC was to find that broadband telephone providers are exempt from CALEA, this disparate treatment would create a regulatory scheme where two substitutable services were regulated differently. This environment of regulatory arbitrage could provide an incentive for traditional telephone providers to become a broadband telephone provider, therefore further limiting the ability of law enforcement agencies to conduct electronic surveillance.

### **IV. Different approaches already are prevalent**

As with any nascent industry, different providers have developed differing ways to deal with the same problem. Some providers of broadband telephone services have already developed ways to comply with electronic surveillance requests by law enforcement. During an interview with CNET, Vonage representative Brooke Schultz described the method that Vonage

---

<sup>5</sup> Joint Petition for Expedited Rulemaking, RM-10865, page 11 n. 29

<sup>6</sup> Joint Petition for Expedited Rulemaking, RM-10865, page 12 n. 30

uses "if Vonage were to receive a proper request to perform a live voice interception, it would be trivial to comply with, because all of the company's VOIP calls flow through central servers." She went on to state that "We [Vonage] are able to copy the data stream and send it in tandem to another location... You can essentially send it to the law enforcement agency you need to sent it to, as long as they have the proper equipment and the proper interconnect."<sup>7</sup>

Other companies have already begun to comply with the current CALEA regulations, such as Cox Communications and Time Warner<sup>8</sup>. Cox Communications has reached an agreement with VeriSign, which will allow law enforcement agencies to conduct electronic surveillance on any of its voice over internet protocol (VoIP) phone subscribers.<sup>9</sup> Yet other companies are not sure if they can provide a CALEA compliant service to law enforcement agencies. The founder of Free World Dialup (FWD), Jeff Pulver stated in a CNET news article that if FWD received a request from a law enforcement agency, "he would need a few months science project to see if it could be done."<sup>10</sup> The founder of Skype, Niklas Zennstrom states in the same article that "even if his company could tackle the arduous task of pulling a Skype call from the Internet, police would only hear gibberish because the data bits are encrypted."<sup>10</sup>

With such inconsistencies already prevalent in this Industry, the FCC should act now before a myriad of differing approaches causes costly retrofitting of existing networks if compliance is required in the future.

---

<sup>7</sup> See *FBI targets Net phoning*, CNET News.com (July 29, 2003)

<sup>8</sup> *Cable taps into wiretap law*, CNET News.com (March 16, 2004)

<sup>9</sup> *Cox closes wiretap hole for VoIP*, CNET News.com (April 5, 2004)

<sup>10</sup> *VoIP: It's not so easy to listen in*, CNET News.com (February 13, 2004)

## **V. Impact of Provider's features**

As the Commission is aware, providers of broadband telephone services offer a wide range of options and features. Some of those same options that may increase customer acceptance and retention can also create a hindrance to the ability of law enforcement agencies to conduct electronic surveillance. As stated above, the use of encryption on VoIP calls - which increases consumer protection by reducing the possibility of someone eavesdropping on those calls - can also create a situation where even if law enforcement is able to capture the phone call, they would be unable to listen in.<sup>11</sup> Other companies have begun to follow suit, with VoicePulse announcing just recently that it will be adding encryption to every phone call its customers make.<sup>12</sup>

By finding that broadband telephone providers do qualify as a "telecommunications carrier"<sup>13</sup> as defined in the CALEA act, the FCC will ensure that no matter what features or capabilities a provider of broadband telephone offers, those features do not hinder the ability of law enforcement to conduct electronic surveillance.

## **VI. Impact of Telecommunications Carrier designation**

As the Petition states, a carrier does not need to be considered a "telecommunications carrier" under the Communications Act in order to be designated a "telecommunications carrier" under CALEA.<sup>14</sup> The regulatory classification of broadband telephone providers, or IP-enabled services, under the Communications Act should be determined in the IP-Enabled services docket, and should not have an impact on this proceeding.

---

<sup>11</sup> *VoIP: It's not so easy to listen in*, CNET News.com (February 13, 2004)

<sup>12</sup> *VoIP provider to block eavesdroppers*, CNET News.com (March 30, 2004)

<sup>13</sup> Joint Petition for Expedited Rulemaking, RM-10865, page 4

<sup>14</sup> *Id* at page 9

## VII. OPINION SUMMARY

WGA requests that the Commission find that broadband telephone providers qualify as "telecommunications carriers" under CALEA and subject them to the regulations required under CALEA. According to a representative of Vonage<sup>15</sup>, the technology currently exists for broadband telephone providers to comply with the Act and the process to perform a live voice intercept would be "trivial." If the Commission finds that broadband telephone providers are exempt from CALEA, a different set of rules would be mandated for similar services and would certainly present an opportunity for arbitrage among telecommunications providers and users of telecommunications services.

Respectfully submitted,

By: William J. Warinner  
Managing Principal  
Warinner, Gesinger & Associates, LLC  
10561 Barkley Street, Suite 550  
Overland Park, Kansas 66212  
[Filed Electronically]

April 12, 2004

---

<sup>15</sup> See *FBI targets Net phoning*, CNET News.com (July 29, 2003)